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No. 93-263

In The

Supreme Court of the United States

October Term, 1993

MATT T. KOKKONEN,

Petitioner,

vs.

GUARDIAN LIFE INSURANCE COMPANY OF AMERICA; GUARDIAN INSURANCE AND ANNUITY CORPORATION; and GUARDIAN INVESTOR SERVICES CORPORATION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

Respondents' resort to the doctrine of ancillary jurisdiction to salvage jurisdiction, or, alternatively, to Federal Rule of Civil Procedure 60(b) to confer jurisdiction, over post-dismissal motions to enforce settlement agreements is not well-founded and is based on a misreading of the cases on which they purport to rely. Moreover, Respondents' advocacy of either a *forum conveniens* test, allowing "the federal courts [to] retain discretion to decide whether they – or the state courts – are better equipped to

resolve the particular settlement dispute in question" (Brief for Respondents, p. 8), or an "intimately involved" test (*id.*), only belies and exacerbates the Constitutional conundrum that is the subject of the writ granted in this case.

I. PRINCIPLES OF ANCILLARY JURISDICTION DO NOT SUPPORT THE POST-DISMISSAL ENFORCEMENT OF A SETTLEMENT AGREEMENT.

Respondents argue that the doctrine of ancillary jurisdiction confers power on a district court to enforce a contractual settlement after the dismissal of a case, even one, as is the case here, in which the court entered no judgment or formal order containing binding terms subject to further enforcement.[1] (Brief for Respondents, pp. 10-16.) Principles of ancillary jurisdiction, however, do not support the exercise of jurisdiction in this case, nor have Respondents cited any cases which support their erroneous conclusion. In fact, as discussed below, all cases cited and relied on by Respondents involved either the enforcement of prior judgments or formal orders, or arose from conduct which occurred during the period the court actually had jurisdiction and are inapposite to the question presented.

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[1] As the State Amici point out in their brief (Brief for the States of Ohio, Alaska, Illinois, Kansas, Massachusetts, Montana, Oklahoma, Pennsylvania, Virginia, and the District of Columbia as Amici Curiae in Support of Petitioner ("Brief for Amici"), significant differences exist between on the one hand a contractual settlement which results in dismissal and on the other hand a judgment or consent decree. *See* Brief for Amici, discussion at pp.14-15.

A. Enforcement of Contractual Settlement Agreement Does Not Meet Criteria of Ancillary Jurisdiction.

"Ancillary jurisdiction permits courts to adjudicate matters that arise during the course of an action and affect the court's ability to render an efficacious judgment or to control the litigation before it." *Curry v. Del Priore*, 941 F.2d 730, 731 (9th Cir. 1991). The enforcement of a contractual settlement that resulted in the dismissal of the action and that was not made part of a court's judgment meets none of those criteria.

The jurisdiction of district courts to enforce their judgments and manage the proceedings before them involves public policy interests and concerns that are simply not present in this case or in cases of this variety. This Court has acknowledged time and again that "[t]he judicial power would be incomplete, and entirely inadequate to the purposes for which it was intended" if the district courts lacked the ability to enforce their judgments, manage their own proceedings and control the conduct of those who appear before them. *See, e.g., Bank of the United States v. Halstead*, 23 U.S. (10 Wheat.) 51, 53, 6 L. Ed. 264 (1825); and *Willy v. Coastal Corp.*, ___ U.S. ___, 112 S. Ct. 1076, 117 L. Ed. 2d 280, *reh'g denied*, 112 S. Ct. 2001, 118 L. Ed. 2d 596 (1992) (Rule 11 sanctions upheld despite eventual determination that district court lacked subject matter jurisdiction because "the maintenance of orderly procedure" is vital to the proper functioning of the court).

No such interests would be served through the enforcement of the settlement agreement in the present case. In this case, there exists no judgment to enforce, and

no conduct during the litigation, the maintenance of which would be vital to the proper functioning of the court. To expand the concept of ancillary jurisdiction to the boundless extent sought by Respondents would render the "limited jurisdiction" of federal courts meaningless.

B. Cases Cited by Respondents Distinguishable; None Support Use of Ancillary Jurisdiction to Enforce Settlement Following Dismissal.

All of the cases cited by Respondents are readily distinguishable in that they all involved either the enforcement of prior judgments or arose from conduct which occurred during the period in which the court actually had jurisdiction. None of the cases support the use of ancillary jurisdiction to ***enforce*** a settlement agreement following dismissal. *See, e.g., Sandlin v. Corporate Interiors, Inc.*, 972 F.2d 1212 (10th Cir. 1992) (post-judgment claim against a non-party not arising out of the same facts that gave rise to the judgment); *White v. New Hampshire Dept. of Employment Sec.*, 455 U.S. 445 (1982) (*judgment* based on settlement and consent decree); *United States v. Ford*, 650 F.2d 1141 (9th Cir. 1981) (court had jurisdiction to determine "prevailing party" entitled to attorney's fees pursuant to 28 U.S.C. § 1988); *Chambers v. NASCO, Inc.*, ___ U.S. ___, 111 S. Ct. 2123, 115 L. Ed. 2d 27, *reh'g denied*, 112 S. Ct. 12, 115 L. Ed. 2d 1097 (1991) (court may impose sanctions under Rule 11 due to its inherent power to manage its proceedings and control the conduct of those who appear before it); and *Grimes v. Chrysler Motors Corp.*, 565 F.2d 841 (2d Cir. 1977) (court had jurisdiction to resolve fee dispute between attorneys

where it maintained control over the distribution of settlement funds).

In only one case cited by Respondents did the court discuss ancillary jurisdiction in connection with the post-dismissal enforcement of a settlement agreement: *Hamilton v. School Committee of City of Boston*, 725 F. Supp. 641 (D.Mass. 1989). In *Hamilton*, the court relied on dictum from *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368 (6th Cir. 1976) to support its use of a "discretionary" standard for the post-dismissal enforcement of a settlement agreement. It was not clear whether the district court based its decision on principles of ancillary jurisdiction or on the vague notion of "inherent jurisdiction." Regardless, reliance on *Aro* was misplaced. In *Aro*, the court vacated its order of dismissal, and then enforced the settlement agreement; the court did not, in accordance with its dictum, seek to enforce the agreement before it re-acquired jurisdiction.[2]

Respondents also cite to cases extending ancillary jurisdiction to pendent or "nonfederal" claims and argue by analogy that the court should in effect extend jurisdiction to a state claim (enforcement of the collateral settlement agreement) by reason of the prior although now dismissed federal case (*see, e.g.*, Brief for Respondents, p. 14). This argument also fails.

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[2] Moreover, as noted in Petitioner's Brief on Merits at p. 28 and n. 21, *Aro* not only was a patent action over which the federal court had exclusive jurisdiction but the holding was mistakenly based on precedent supporting inherent supervisory jurisdiction over settlement of a state court action premised on the *general* jurisdiction of state courts.

First, the attempted analogy inverts the jurisdictional premise by urging the court to exercise its discretion to hear the claim before determining the more fundamental query of whether the court has the power to act in the first place. Furthermore, not only does the analogy fail with respect to the test set out in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) (district courts authorized to exercise discretion to hear state law claims when state and federal claims derive from common nucleus of operative fact, claims are such that a plaintiff would ordinarily be expected to try them all in one proceeding, and federal issues are substantial), but Congress in 1993 enacted a supplemental jurisdiction statute, 28 U.S.C. § 1367, which at 1367(c)(3) expressly provides for and excepts from the exercise of supplemental jurisdiction those cases where "the district court has dismissed all claims over which it has original jurisdiction." If there was any doubt, this statute evinces a clear Congressional policy that, in the case of pendent or supplemental jurisdiction, a pending claim over which the district court has original jurisdiction is a predicate to the exercise of ancillary jurisdiction. Here, the district court had unconditionally dismissed all claims over which it had original jurisdiction.

Respondents' reliance on principles of ancillary jurisdiction, therefore, is simply misplaced, fails to address the circumstance presented here of attempted enforcement of a private settlement agreement after entry of an unconditional dismissal, and ignores the limited nature of federal court jurisdiction.

II. POST-DISMISSAL ACTIONS TO ENFORCE SETTLEMENT AGREEMENTS, REGARDLESS OF THEIR FORM, REQUIRE AN INDEPENDENT BASIS FOR FEDERAL JURISDICTION.

Respondents' argument that the motion to enforce the settlement agreement was really a Rule 60(b) motion or an independent action ignores the principle that the Federal Rules cannot themselves confer jurisdiction. In any post-dismissal action to enforce a settlement agreement, regardless of the form of the action, the district court should only enforce the agreement if it has some legitimate basis for exercising jurisdiction. *See Fairfax Countywide Citizens Ass'n v. Fairfax County*, 571 F.2d 1299 (4th Cir.), *cert. denied*, 439 U.S. 1047, 99 S. Ct. 722, 58 L. Ed. 2d 706 (1978); *McCall-Bey v. Franzen*, 777 F.2d 1178 (7th Cir. 1985); and *Sawka v. Healtheast, Inc.*, 989 F.2d 138 (3d Cir. 1993).

The consensus of the Circuit Courts of Appeals that have addressed this issue is that a district court has no jurisdiction to entertain a motion to enforce a settlement agreement after it has unconditionally dismissed a lawsuit. The only remedies available to enforce the settlement agreement are to file a Rule 60(b) motion to vacate the dismissal and reinstate the case to the court's docket or to bring an independent action to enforce the agreement. *See, e.g., Fairfax*, 571 F.2d 1299; *McCall-Bey*, 777 F.2d 1178; *United Steelworkers v. Libby, McNeil & Libby*, 895 F.2d 421 (7th Cir. 1990); *Sawka*, 989 F.2d 138; *Adduono v. World Hockey Ass'n*, 824 F.2d 617 (8th Cir. 1987); and *Stipelcovich v. Sand Dollar Marine, Inc.*, 805 F.2d 599 (5th Cir. 1986). Guardian did neither.

Guardian fails in its attempt to construe its Motion to Enforce Settlement Agreement (JA 92-94) as a Rule 60(b) motion.[3] *See* Respondent's Brief, pp. 16-22. In the cases cited above, none of the Courts of Appeals, in reviewing motions to enforce settlement agreements, construed such motions as Rule 60(b) motions. The Sixth Circuit flatly refused to treat a motion to enforce a settlement agreement as a Rule 60(b) motion. *See Hinsdale v. Farmers National Bank & Trust Co.*, 823 F.2d 993, 996 n.3 (6th Cir. 1987).[4]

However, even if Guardian's Motion to Enforce Settlement could be construed as a Rule 60(b) motion, the Rule merely permits a district court to try the original cause of action. *Fairfax*, 571 F.2d at 1304 n.11 and 1305-6. The power to vacate under Rule 60(b) is not the power to enforce a collateral agreement. *McCall-Bey*, 777 F.2d at 1186. The principle of limited federal jurisdiction dictates that the district court not be empowered to enforce the

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[3] Interestingly, Respondents conceded below, in their brief before the Ninth Circuit, that "Guardian certainly could have moved for vacation of the Stipulation and Order of Dismissal under Rule 60(b)(6)" but did not do so because they did not believe it was a "requirement in this [9th] Circuit". (JA 230.)

[4] Guardian cites only two cases for this proposition, *Lasky v. Continental Products Corp.*, 804 F.2d 250 (3d Cir. 1986) and *United States v. Wissahickon Tool Works*, 200 F.2d 936 (2d Cir. 1952). In *Lasky*, the Third Circuit points out that the appellant had specifically referenced Rule 60(b) in its motion and that it relied on the rule in its brief supporting the motion. *Lasky*, 804 F.2d at 253 n.4. In *Wissahickon*, the Second Circuit only very reluctantly treated a motion to enforce as a Rule 60(b) motion and then only because the district court and the parties had already participated in the "irregular procedure".

agreement unless the agreement has been approved and incorporated into an order of the court, or, at the time the court is requested to enforce the agreement, there exists some independent ground upon which to base federal jurisdiction. *Fairfax*, 571 F.2d at 1303. Such was not the case here.

Likewise, Guardian's Motion to Enforce Settlement Agreement fails as an independent action. Notwithstanding Guardian's cited authority to the contrary, an independent action must have some independent basis for jurisdiction. *Fairfax*, 571 F.2d at 1303. No such independent basis exists here. Guardian cannot rely on Rule 60(b) as a basis for jurisdiction. It is well-settled that the Federal Rules of Civil Procedure cannot confer jurisdiction. Fed. R. Civ. P. 82; *see also Fairfax*, 571 F.2d at 1304 n. 11; *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 70 (2d Cir. 1990), *cert. denied*, 112 S. Ct. 3036 (1992).

Guardian relies on a single case and its progeny for the proposition that inherent jurisdiction is a sufficient basis for the court to exercise jurisdiction over a second, independent case. *See Pacific R.R. of Mo. v. Missouri Pac. Ry. Co.*, 111 U.S. 505, 4 S. Ct. 583, 28 L. Ed. 498 (1884); *Cresswell*, 922 F.2d 60; *Crosby v. Mills*, 413 F.2d 1273 (10th Cir. 1969); *Martina Theatre Corp. v. Schine Chain Theatres, Inc.*, 278 F.2d 798 (2d Cir. 1960).

Pacific R.R. of Mo. is cited as the preeminent case in every other case set forth above. However, in *Pacific R.R. of Mo.* the district court actually entered a decree foreclosing a mortgage on railroad property by the plaintiff and ordering its sale. In determining that the district court had jurisdiction, this Court noted that the court had

jurisdiction in part because it had made the original decree in the first suit. *Pacific R.R. Co. of Mo.*, 111 U.S. at 521-522. In no way did the case involve an unconditional dismissal of a federal case.

In the remaining cases, the courts seized upon the language in *Pacific R.R. of Mo.*, overlooking the facts of the case and thereby improperly expanding upon the federal courts' jurisdiction.[5] Such an expansion directly conflicts with the notion of limited federal jurisdiction.

III. THE DISCRETIONARY AND SUBJECTIVE *FORUM CONVENIENS* AND INTIMATE INVOLVEMENT TESTS PROMOTED BY RESPONDENTS ARE INCONSISTENT WITH, AND WOULD RELEASE THE DISTRICT COURTS FROM, THE TRADITIONAL CONSTRAINTS ON FEDERAL JUDICIAL POWER THAT THE CONSTITUTION ENVISIONS.

Respondents take Petitioner to task (Brief of Respondents, p. 26) for "his suggestion that the Ninth Circuit's decision creates the prospect of federal courts dispensing

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[5] In *Martina Theatre Co.*, the Second Circuit barely addresses the jurisdictional issue, citing briefly to the language in *Pacific R.R.* as the basis for the district court's jurisdiction. *Martina Theatre*, 278 F.2d at 799 n.1. It is likely the district court would have had subject matter jurisdiction over the case as it involved anti-trust issues. In addition, the Tenth Circuit in *Crosby v. Mills*, although citing to the language in *Pacific R.R. Co. of Mo.*, found that jurisdiction existed under 28 U.S.C. 1334, which gives district courts original jurisdiction of all matters and proceedings in bankruptcy. *Crosby v. Mills*, 413 F.2d at 1276.

justice, vigilante-like, whenever they feel like it".[6] Yet that is exactly the open-ended discretion to which the Respondents ask this Court to give its imprimatur.

Respondents argue – and repeatedly ask this Court to determine – that "a district court may exercise jurisdiction, *in its discretion*, to enforce a settlement agreement after the case has been dismissed" (Brief for Respondents, p. 30) [emphasis added] and that "federal courts have discretion to exercise – or decline to exercise – ancillary jurisdiction to enforce settlement agreements post-dismissal" (*Id.* at 22). Under Respondents' formulation, such discretion is virtually unbridled by objective criteria except the requirement that the case had once been "before the court".

Respondents variously suggest that the district courts' discretion be governed either by *forum conveniens* factors, "the federal courts will retain discretion to decide whether they – or the state courts – are better equipped to resolve the particular dispute in question" (*Id.* at 8), or by how "intimately involved" the court had been in the case.

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[6] Respondents do not give a citation but presumably they are referring to footnote 13, at page 12 of Brief on the Merits of Petitioner which quotes a prominent Constitutional law scholar and professor, concerned about the incremental growth and self-perpetuating nature of inherent jurisdiction, about *this* case: " . . . where does it stop? There would no longer be any need for traditional rulemaking. Judges would just become roving dispute tribunals, and that's where they would get into trouble. There would not be the limits on their power that the Constitution had envisioned." Professor Rex Perschbacher, quoted in *Settlement Authority Will Be Determined*, San Francisco Daily J., October 19, 1993, p. 6, col. 3.

Any action that had been before the court at any time would be fair game subject only to the Respondents' other criterium: that the settlement had been reached "under the Court's auspices" (*Id.* at 26). This latter term would, according to Respondents, rest on how "intimately involved" the court was with the settlement (*Id.* at 8). For example, they argue the court should exercise jurisdiction here because the parties "formally appeared in chambers" (*Id.* at 3), the "district judge actively participated in the settlement process" in chambers (*Id.* at 16), and the settlement was summarized in chambers in the presence of the court (*Id.*).

In so merging discretion based on such subjective factors with jurisdiction, Respondents themselves well illustrate the very pitfalls and uncertainty that pose a hazard of Constitutional dimensions to the traditional constraints of Article III. The parties must be able to know, with a minimum of uncertainty, whether their decisions about how to resolve a pending lawsuit will place them on one side of this line or the other, with all the attendant consequences for their further conduct. In addition to the parties' needs and interests, Constitutional concerns, not only of honoring and avoiding the incremental expansion of the scope of Article III jurisdiction, but of federal-state comity, demand a clear test which Petitioner and Amici agree should be the entry of a formal order containing binding terms subject to further enforcement (one of which might be an explicit retention of jurisdiction over the parties and settlement).

Of necessity, and because jurisdiction is an indispensible requisite, form *is* often substance with respect to ascertaining the existence of jurisdiction. A bright line

rule, such as that proposed by Petitioner and Amici,[7] would provide such form and help ensure that the power of a federal court to entertain an enforcement action of a contractual settlement agreement is established first, before and independently of its decision whether, if jurisdiction exists, to exercise its discretion to commit federal judicial energy to such enforcement.[8] Respondents'

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[7] Ironically, it is Respondents who, having insisted that the settlement not be reduced to writing, now complain (*see* Brief of Respondents, p. 24) that Petitioner's proposed rule requiring the express retention of jurisdiction, and Amici's proposed rule requiring the court to have entered a formal order containing binding terms subject to further enforcement (*see, e.g.* Brief for Amici, p. 15), could force the disclosure of too many of the terms of the settlement and thereby serve as a disincentive to settlement. Such a high degree of secrecy and the consequent reluctance to have a formal order entered containing binding terms may be incompatible with a desire to maintain federal court jurisdiction and underscore the efficacy of a private settlement which could provide for its own enforcement through a confidential means, e.g., ADR with Judicial and Mediation Service (JAMS) or other vendor of private ADR services.

[8] When and whether to exercise existing jurisdiction is a separate but important question being increasingly confronted by federal courts. Federal judicial resources are limited. Even in cases where jurisdiction is manifest, courts are showing increased circumspection with respect to when a court should exercise discretion not to enforce or oversee a settlement incorporated into a judgment or decree, and sometimes even deciding to terminate the exercise of jurisdiction over cases already before them. For example, sitting *en banc*, the 7th Circuit in *Evans v. City of Chicago*, 10 F.3d 474 (7th Cir. 1993) terminated the district court's exercise of jurisdiction over enforcement of a consent decree finding that a substantial federal claim must be present not only when the decree was entered, but when it is enforced in order to justify the continued commitment of federal judicial resources. Petitioner submits these concerns,

arguments, centering on free-form inquiries as to whether the federal or state court is better suited to decide the question or as to how intimately involved the federal court was in the case, blur the fundamental distinction between the *power* of federal courts to entertain a particular claim on one hand and the *discretion*, once jurisdiction exists, not to exercise that jurisdiction on the other, a distinction that has Constitutional dimensions.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded with direction that the order of the district court be vacated and set aside as having been entered in excess of its jurisdiction.

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Respectfully submitted,

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currently arising in the areas of civil rights, antitrust, employment and environmental decrees, will become more germane to the federal court enforcement of private settlements which have been incorporated into judgments or decrees.